

DER-30 / Real Property Eligibility Opinions for the Brownfield Cleanup Program

New York State Department of Environmental Conservation

DER Program Policy

Issuing Authority: Val Washington

Title: Deputy Commissioner
Office of Remediation and Materials Management

Date Issued:

Latest Date Revised: New

I. Summary:

This guidance outlines the procedures and the circumstances under which the New York State Department of Environmental Conservation (DEC) will issue an opinion on eligibility for participation in the Brownfield Cleanup Program (BCP) relative to real property within a Brownfield Opportunity Area (BOA) study area or designated BOA pursuant to General Municipal Law Section 970-R. Upon a request submitted in accordance with this policy, DEC will issue an eligibility opinion limited to whether such real property satisfies the definition of a “brownfield site” set forth at Environmental Conservation Law (ECL) 27-1405(2). The evaluation will be performed in conformance with the applicable statute, regulations and BCP eligibility guidance.

II. Policy:

Legislation establishing the BCP (see Article 27, Title 14 of the Environmental Conservation Law [ECL]) includes a definition of a “brownfield site”. This definition is further detailed in the implementing regulations at 6 NYCRR 375-3.3 and in the BCP eligibility guidance. The 2003 legislation which enacted the BCP also created the BOA program, which provides funding and assistance to municipalities and community-based organizations for planning activities to facilitate the reuse and redevelopment of brownfields and to revitalize blighted communities. An important connection between these two programs was established with an amendment to section 21 of the New York State Tax Law in 2008 to provide additional brownfield development tax credits for BCP projects within a designated BOA, provided the reuse/redevelopment is consistent with the BOA plan.

In further recognition of the beneficial role the BCP can play in advancing the goals of the BOA Program, DEC will provide for early BCP eligibility opinions relative to real property within a BOA study area or designated BOA, thereby facilitating the marketing, reuse and redevelopment of properties within the BOA Program. It will establish a process that is easy to use and available before a site owner or developer is prepared to propose an actual project or submit an application for participation in the BCP. An early eligibility determination under this policy will increase the certainty and predictability that developers need before investing in contaminated real property, and will reduce the time required to process an application when participation in the BCP is ultimately sought.

The procedures set forth in this policy document are intended for the use and guidance of both DEC personnel and those seeking a determination under the policy. The policy is not intended to create any substantive or procedural rights enforceable by any party in administrative or judicial litigation with DEC. DEC reserves the right to vary these procedures to address site-specific circumstances, and to

revise them as it deems appropriate based on changes in law or its experience in implementing the policy.

III. Purpose and Background:

There are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden. Because these sites, known as brownfields, discourage redevelopment in established, usually urban, communities, they also contribute to sprawling development and loss of open space. It is the policy of the State of New York (State) to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution in order to enhance the health, safety, and welfare of the people of the State and their overall economic and social well-being. It is also the policy of the State to advance land use planning and revitalization activities through the implementation of the BOA program. DEC is able to advance these policies by adopting procedures that encourage participation in the BCP and the cleanup of contaminated real property for reuse and redevelopment, especially property within BOAs. These policies will also be advanced by providing the certainty and predictability that developers need in making investment decisions. Accordingly, upon request, DEC will review information and environmental data available relative to specified real property within a BOA study area or designated BOA and, based upon that information, provide an opinion as to whether the real property meets the definition of a brownfield site, and is thus eligible for participation in the BCP.

IV. Responsibility:

The responsibility for maintaining and updating this policy lies with the Bureau of Program Management in the Division of Environmental Remediation (DER). DER program staff are responsible for implementing this policy, with input from other involved DEC Divisions (e.g., Office of General Counsel).

V. Procedure:

A. Request:

(1) DEC will, upon request and after review of required submissions, issue an eligibility opinion as to whether specified real property meets the definition of a "brownfield site" as defined at ECL 27-1405(2). A "requestor" is defined as any party that submits a request for a real property eligibility opinion in accordance with this policy.

(2) A request may only be made in regard to real property within a BOA study area or designated BOA.

(3) Such request shall be submitted in writing as follows:

- **Two (2)** copies, one paper copy with original signatures and one electronic copy in Portable Document Format (PDF) on a CD, must be sent to:

Chief, Site Control Section
New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, NY 12233-7020

• **One (1)** paper copy must be sent to DEC regional contact in the regional office covering the county in which the site is located. The DEC website provides [addresses](#) for the nine regional offices.

(4) To be considered complete, each request shall be submitted on a form prescribed by DEC (see: [web link to be added upon finalization for the form and instructions]) and include:

(a) requestor information (e.g., contact information);

(b) property information (e.g., location, requested facts in support of eligibility, environmental history, land use);

(c) the name and address of current and past property owners;

(d) proof of the consent of the current owner(s) of the real property which is the subject of the request, if the requestor is not the owner; and

(e) all environmental reports and data available to the requestor, including at a minimum a Phase II environmental site assessment (ESA) in accordance with ASTM E1903-97 (2002) (Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process). The Phase II must include information regarding the potential presence of a range of contaminants as defined at ECL 27-1405(8), including hazardous wastes within the scope of the State Superfund Program and petroleum products within the scope of Article 12 of the Navigation Law.

(5) Within 30 calendar days after the receipt of a request, DEC shall mail a notice to the requestor indicating the request is either:

(a) complete for purposes of review, in which case DEC will, at the earliest available opportunity, submit for publication in the Environmental Notice Bulletin (ENB) a notice of the request for an eligibility determination. Notice shall also be sent by the requestor to any person whom DEC has reason to believe has an ownership interest in the property. Public comments on the request must be received by DEC no later than 30 calendar days after publication in the ENB. The due date will be specified in the notice. DEC will consider such comments in rendering the opinion. DEC may provide copies of comments to the requestor and may ask that the requestor provide responses to such comments within 10 business days from their receipt; or

(b) incomplete because of the lack of certain information needed to render an opinion, in which case DEC will identify the missing information. If the request is not supplemented within 30 days of DEC's notice of insufficient information, DEC will notify the requestor that its request is deemed withdrawn and DEC will not take any further action on such request.

(6) Upon mutual written agreement between the requestor and DEC, the time periods set forth herein may be extended to a date certain.

B. Issuance of Eligibility Opinion

(1) DEC will use its best efforts to issue an eligibility opinion within 60 calendar days of the receipt of a complete request for such opinion. All opinions shall be available to the public pursuant to the provisions of the Freedom of Information Law.

(2) Opinions will be made on the facts alleged in the request and the attachments thereto. DEC may also take official notice of information in its records or otherwise available, provided that the opinion must reference all information relied upon in issuing such opinion.

(3) The opinion will state whether the real property is a brownfield, and therefore eligible for participation in the BCP, in that its a) reuse or redevelopment may be complicated by the presence or potential presence of a contaminant, and b) participation in the BCP is not precluded pursuant to ECL 27-1405(2)(a) - (e).

(4) Opinion letters stating that a site is eligible for the BCP will expire in one year from the date of the letter and are subject to the limitations set forth in Paragraph V.E.3. below.

(5) Whenever participation in the BCP is sought for real property that has been the subject of an opinion letter pursuant to this policy, the application must include a copy of DEC's opinion letter together with a complete description of any changes in or additions to the information relied on by DEC in issuing the opinion letter.

C. Grounds for Declining to Issue an Eligibility Opinion

DEC may decline to issue an opinion on any of the following grounds:

(1) the request raises issues which are, have been or should have been the subject of DEC review pursuant to a previous application for admission into the BCP;

(2) the request does not contain sufficient information or the requestor has not adequately responded to DEC's request for additional information needed to render an opinion;

(3) the request proposes alternative courses of proposed transactions or hypothetical situations;

(4) all parties involved are not sufficiently identified and described;

(5) there is pending enforcement relating to the property; or

(6) a response to the request is not in the public interest.

D. Withdrawal of Request for Eligibility Opinion

The request for an opinion may be withdrawn at any time prior to the issuance of an opinion. Even though a request is withdrawn, all correspondence and exhibits will be retained by DEC.

E. Effect of Eligibility Opinion

(1) The opinion is a non-binding opinion of DEC as to the application of ECL 27-1405(2), specifically whether the real property is a brownfield, and is therefore eligible for participation in the BCP, in that its a) reuse or redevelopment may be complicated by the presence or potential presence of a contaminant, and b) participation in the BCP is not precluded pursuant to ECL 27-1405(2)(a) - (e). The opinion assumes that all material facts and representations set forth in the request are accurate. The opinion may be relied upon only to the extent that the request fully and accurately contains all the

material facts and representations necessary to the issuance of the opinion, and there have been no subsequent changes in material facts or site conditions.

(2) The opinion will relate only to the consideration of whether the real property satisfies the definition set forth at ECL 27-1405(2). The opinion will not extend to whether a particular party would qualify for participation in the BCP pursuant to ECL 27-1407(8)(b), 27-1407(8)(c), or 27-1407(9).

(3) The opinion represents the state of the law, regulation and guidance at the time such opinion is rendered. The opinion may no longer be valid if, for example, there have been subsequent court cases or statutory amendments that bear on the eligibility of the site discussed in the opinion.

(4) The opinion does not represent a final agency determination and, therefore, is not subject to judicial review pursuant to able Article 78 of the Civil Practice Law and Rules (CPLR).

VI. Related References:

- ◆ Environmental Conservation Law, Article 27, Title 14
- ◆ General Municipal Law, Section 970-R
- ◆ New York State Tax Law, Sections 21-23
- ◆ 6 NYCRR Part 375, Environmental Remediation Programs. December 14, 2006
- ◆ Brownfield Cleanup Program (BCP) Eligibility Guidance (2005 or latest version)
- ◆ ASTM E1903-97 (2002): Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process
- ◆ [BCP Request for Eligibility Opinion For Real Property in a Brownfield Opportunity Area - Form and Instructions](#)
- ◆ [BCP Request for Eligibility Opinion For Real Property in a Brownfield Opportunity Area: Property Owner Consent Form](#)